prejudicial. People *v.* Hartman, supra; State *v.* Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108."

Homicide—Self Defence—Duty to Retreat.—In Brown *v.* United States, 41 Sup. Ct. 501, the Supreme Court of the United States held that the failure of one killing another to retreat is a circumstance to be considered with all others in determining whether he went farther than he was justified in doing, but is not categorical proof of guilt, and it was error to charge that a party assaulted was always under the obligation to retreat so long as retreat was open to him provided he could do so without danger, and that unless retreat would have appeared to a man of reasonable prudence in defendant's position as involving danger he was not entitled to stand his ground, especially where defendant was at a place where he was called to be in the discharge of his duty in superintending excavation work.

The court said in part: "There had been trouble between Hermis and the defendant for a long time. There was evidence that Hermis had twice assaulted the defendant with a knife and had made threats communicated to the defendant that the next time, one of them would go off in a black box. On the day in question the defendant was at the place above mentioned superintending excavation work for a postoffice. In view of Hermis's threats he had taken a pistol with him and had laid it in his coat upon a dump. Hermis was driven up by a witness, in a cart to be loaded, and the defendant said that certain earth was not to be removed, whereupon Hermis came toward him, the defendant says, with a knife. The defendant retreated some twenty or twenty-five feet to where his coat was and got his pistol. Hermis was striking at him and the defendant fired four shots and killed him. The judge instructed the jury among other things that "it is necessary to remember, in considering the question of self defence, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." The instruction was reinforced by the further intimation that unless "retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm" the defendant was not entitled to stand his ground. An instruction to the effect that if the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm from Hermis he was not bound to retreat was refused. So the question is brought out with sufficient clearness whether the formula laid down by the Court and often repeated by the ancient law is adequate to the protection of the defendant's rights.

"It is useless to go into the developments of the law from the

time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in Coke, Third Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason. Other examples may be found in the law as to trespass ab initio, Commonwealth *v.* Rubin, 165 Mass. 453, 43 N. E. 200, and as to fresh complaint after rape. Commonwealth *v.* Cleary, 172 Mass. 175, 51 N. E. 746. Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self defence. That has been the decision of this Court. Beard *v.* United States, 158 U. S. 550, 559, 15 Sup. Ct. 962, 39 L. Ed. 1086. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. Rowe *v.* United States, 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547. The law of Texas very strongly adopts these views as is shown by many cases, of which it is enough to cite two. Cooper *v.* State, 49 Tex. Cr. R. 28, 38, 89 S. W. 1068. Baltrip *v.* State, 30 Tex. App. 545, 549, 17 S. W. 1106.

"It is true that in the case of Beard he was upon his own land (not in his house,) and in that of Rowe he was in the room of a hotel, but those facts, although mentioned by the Court, would not have bettered the defence by the old common law and were not appreciably more favorable than that the defendant here was at a place where he was called to be, in the discharge of his duty. There was evidence that the last shot was fired after Hermis was down. The jury might not believe the defendant's testimony that it was an accidental discharge, but the suggestion of the Government that this Court may disregard the considerable body of evidence that the shooting was in self defence is based upon a misunderstanding of what was meant by some language in Battle *v.* United States, 209 U. S. 36, 38, 28 Sup. Ct. 422, 52 L. Ed. 670. Moreover if the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on, and if the defendant believed that he was fighting for his life.

"The Government presents a different case. It denies that Hermis had a knife and even that Brown was acting in self defence. Notwithstanding the repeated threats of Hermis and intimations that one of the two would die at the next encounter, which seem hardly to be denied, of course it was possible for the jury to find that Brown had not sufficient reason to think that his life was in danger at that time, that he exceeded the limits of reasonable self defence or even that he was the attacking party. But upon the hypothesis to which the evidence gave much color, that Hermis began the attack, the instruction that we have stated was wrong."

Homicide—Self-Defense as Affected by Defendant's Being Engaged in Gambling.—In State *v.* Leak, 103 S. E. 549, the Supreme Court of South Carolina held that a defendant is not deprived of the right of self-defense on the theory of provoking the difficulty, because he was at the time engaged in gambling with deceased, who became provoked and attacked him on account of his winning his money.

The court said in part: "His Honor, the presiding judge, thus charged the jury: 'I charge you that in this case, if you should find that the defendant at the bar, Henry Leak, provided—if he was gambling and if he provoked—the fight with any other person, on account of any money won by gaming, he would be violating the law, and the plea of self-defense would not be available to him. I repeat, if you should find in this case that the defendant at the bar provoked the difficulty, on account of money won in a game of chance, or in gambling, the plea of self-defense would not be available to him. On the other hand, I charge you that if the difficulty was provoked by the deceased, or if it was not provoked by the defendant, on account of the game of chance, why then the plea of self-defense would be available to him, and, if it is proven to your satisfaction, as I shall charge you further, why you will give him the benefit of it. The law does not recognize the rights of gambling; on the contrary, gambling is unlawful in this state. * * *' It cannot be successfully contended, when a fight takes place during a gambling game, between the participants, that such a result was naturally and probably to be anticipated from the mere fact that gambling is unlawful. The causal connection between the unlawful act of gambling and the encounter arising during the progress of the game between the participants is too remote to destroy the right of self-defense. Furthermore, if the ruling of his Honor, the presiding judge, should be sustained, it would lead logically to the further untenable proposition that neither the assailant nor the party upon whom the assault was made would have the right to rely upon the plea of self-defense. The exception raising this question is sustained."

Payment—Agreement to Pay in Liberty Bonds.—In Nelson *v.* Rhem,